

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN 27 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Further Forbearance from
Title II Regulation for Certain Types of
Commercial Mobile Radio Service
Providers

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GN Docket No. 94-33

To: The Commission

COMMENTS OF THE E.F. JOHNSON COMPANY

THE E.F. JOHNSON COMPANY

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SUMMARY

The E.F. Johnson Company ("E.F. Johnson" or the "Company") urges that the Federal Communications Commission ("FCC" or "Commission") further forbear from the application of Title II requirements for certain CMRS providers. Not all CMRS licensees will provide services that are directed to the consumer. Accordingly, it is appropriate to forbear from the imposition of Title II regulation for "small" CMRS licensees. The Company suggests that the Commission employ the frequency reuse criteria to determine which CMRS licensees are small. Only those entities with sufficient channels, and therefore, market power, will employ frequency reuse to gain the capacity to offer telephone like service.

For those entities that will be considered small CMRS licensees, the Company asks that the Commission forbear from the imposition of Sections 213, 215, 218, 219 and 220 of the Act and the provisions of Section 225 that would require small CMRS to provide Telecommunications Relay Services ("TRS"). The Company also asks that the Commission confirm that the provisions of Section 228 (to the extent they apply to local exchange carriers) and Section 226 do not apply to small CMRS licensees.

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The E.F. Johnson Company ("E.F. Johnson" or the "Company"), by its attorneys, pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission") hereby submits its Comments in response to the Notice of Proposed Rule Making ("NPRM") adopted in the above referenced proceeding^{1/} in which the Commission intends to provide additional regulatory relief for entities designated "small" Commercial Mobile Radio Service ("CMRS") providers.

I. INTRODUCTION

E.F. Johnson is a leading designer and manufacturer of radio communications and specialty communications products for commercial and public safety use. Founded over 70 years ago as an electronics components manufacturer, E.F. Johnson entered the radio communications equipment market in the late 1940's and is one of the three largest providers of land mobile radio systems in the United States. It produces base stations, vehicular-mounted and portable transceivers that operate in various portions of the radio spectrum that are used by a variety of

^{1/}Notice of Proposed Rule Making, GN Docket No. 94-33, FCC 94-101, Released May 4, 1994.

entities requiring communications capabilities. The Company manufactures products for the 800 MHz, 900 MHz and 220 MHz frequency bands, among others^{2/}. CMRS operators will operate in these bands and in spectrum now used by licensees in the Business Radio Service, for which the Company also manufactures and distributes products.

In the Second Report and Order in General Docket No. 93-252^{3/}, the Commission exempted CMRS licensees from a variety of requirements otherwise imposed by Title II of the Communications Act. There, the Commission determined that the remaining provisions of Title II should be enforced against CMRS providers in order to promote competition or to protect consumers. In this proceeding, the FCC proposed additional regulatory relief for entities that will be designated "small" CMRS providers. The Communications Act establishes the following three part test that must be met for the Commission to further forbear from Title II regulation for certain classes of CMRS licensees: 1) enforcement of the provision is not necessary to ensure that the charges, practices, classifications or regulations for or in connection with the service are just and reasonable and not unjustly discriminatory; 2) enforcement of the provision is not necessary for the protection of the public; and 3) forbearing from enforcing the provision is in the public interest.

The Commission further identified two factors it would examine to determine whether forbearing from enforcing a provision is in the public interest: 1) whether there are differential

^{2/} The Company recently announced plans to manufacture narrowband equipment for the 220 MHz band using Linear Modulation Technology ("LMT"). It expects to begin to manufacture and distribute 220 MHz products in the near future.

^{3/} Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, Gen. Docket No. 93-252, FCC 94-31 (released March 7, 1994) ("Second Report and Order").

costs of compliance with the Title II sections that would make forbearance appropriate for certain entities; and 2) whether the public interest benefits from application of a particular Title II requirement are less for certain types of CMRS providers. Accordingly, the Commission will, in evaluating the last prong of the three part test, examine: 1) the benefits of applying the Title II section; 2) the costs of compliance; and 3) whether the costs outweigh the benefits.

Like the Docket No. 93-252 proceeding^{4/}, the NPRM will have an important effect upon entities in the 800 MHz, 900 MHz and 220 MHz band that currently are governed by Part 90 of the FCC's rules. Business Radio Service licensees, now governed as private carriers, may also be categorized as CMRS providers and potentially subject to further forbearance as a result of this proceeding. The Company is a major manufacturer and distributor of products to these industry segments. Indeed, a significant percentage of the 800 MHz licensees use the Company's LTR® signaling format. Licensees that use the Company's equipment will, therefore, be affected by the new rules adopted as a result of the NPRM, which will, in turn, affect the Company's ability to sell its products. Moreover, E.F. Johnson supports a network of over 600 dealers nationwide, most of whom hold licenses for 220 MHz, 800 MHz, 900 MHz and Business Radio Service systems. The Company's dealers will also be affected by the proposed new regulatory structure. Accordingly, E.F. Johnson is pleased to have this opportunity to submit the following Comments in response to the NPRM.^{5/}

^{4/} See, Further Notice of Proposed Rule Making, GN Docket No. 93-252, FCC 94-100 (released May 20, 1994) ("CMRS Further Notice").

^{5/} The Company's Comments address primarily the distinctions in the regulatory scheme that should govern services that are governed by Part 90 of the Commission's rules. Accordingly, it does not offer distinctions between entities that are now regulated under Part 22 and other sections of the regulations.

II. COMMENTS

A. Certain CMRS Providers Merit Further Forbearance

As noted below, the Company believes that certain CMRS providers should be subject to forbearance from the enforcement of provisions of Title II, where the Commission has the discretion to do so. More importantly, E.F. Johnson expects that in the future, there may be additional Title II requirements for CMRS providers imposed either by Congress or by the Commission itself.^{6/} In those cases, certain classes of CMRS providers, currently governed as Part 90 licensees, should be treated differently than other CMRS licensees. Accordingly, the Company urges the Commission to adopt, in the context of this proceeding, standards that may be employed now and in the future, to determine which entities will preemptively be exempt from Title II regulation when the Commission has the discretion to do so.

The Commission asks whether the size of the provider may be a basis for defining CMRS provider eligibility for further forbearance. Alternatively, the FCC asks whether to consider an analysis of a CMRS provider's customer base as a factor in deciding the appropriateness of further forbearance. Finally, the Commission may extend further forbearance on a case by case basis. Under this last approach, providers seeking further forbearance would petition the Commission for additional relief.

If the Commission determines that further forbearance is appropriate based upon the size of the provider, it may choose among a variety of standards: 1) the definition used by the Small

^{6/}For example, the Commission has initiated a proceeding designed to examine the interconnection rights and equal access obligations for CMRS. See FCC Docket 94-54, Notice of Proposed Rule Making and Notice of Inquiry, adopted June 9, 1994 (FCC 94-145, released June 9, 1994).

Business Administration ("SBA") or a more modest net income and net worth standard; 2) average revenue per subscriber or percentage of interconnected traffic; 3) average number of customers; 4) number of mobile units; 5) average subscriber rate; or 6) number of channels.

If it establishes standards applicable for licensees based upon size, the Commission asks how it should treat affiliated corporations or operators of systems in more than one geographic area or providers that own multiple small systems. The Commission also inquires as to whether it should attribute ownership of systems that are operated pursuant to an exclusive management contract.

In its comments in the CMRS Further Notice, E.F. Johnson urged the Commission to accord different regulatory treatment for "wide area" and "local" specialized mobile radio ("SMR") systems^{2/}. It urged the Commission to find that wide area SMR systems are substantially similar to cellular systems, noting that these wide area systems are designed in a fashion similar to cellular systems through the use of frequency reuse techniques and have publicly stated their desire to compete with cellular systems.

In that proceeding, the Company pointed out that there is a significant difference in the type of service that local SMR systems and wide area SMR systems are, or will be, capable of offering. It is the aggregation of sufficient spectrum that permits 800 MHz wide area SMR providers to employ frequency reuse, within their operating area, creating the capacity that enables them to offer services similar to those provided by cellular systems. Accordingly, the Company urges that the Commission adopt the same standard in determining when to forbear

^{2/}The Company includes in the term "local SMR" provider any entity that will be subject to similar regulatory treatment. E.F. Johnson has urged the Commission to regulate 220 MHz systems, non wide area 800 MHz and 900 MHz SMR systems and Business Radio Service CMRS licensees as local SMR providers.

from Title II requirements. The full range of Title II protection is necessary for entities that will be broadly offering mobile telephone services to the public. Local SMR licensees that will be regulated as CMRS providers will, by definition, offer interconnected service to the public. However, the market power they possess, and their ability to compete with cellular licensees will be limited by their relatively small number of licensed channels and the lack of capacity to employ frequency reuse. It is therefore, logical that these local SMR licensees not be subject to the same level of Title II regulation as wide area SMR providers.

This formulation is in accordance with at least two of the measures that the Commission proposes for determining small CMRS licensees. The Commission states that the number of channels licensed to a CMRS provider would provide a straight forward means of identifying small CMRS providers. It also states that an analysis of a CMRS provider's customer base maybe a factor in determining whether to apply further forbearance. The Company's formulation encompasses both of these concepts. Using E.F. Johnson's approach, the Commission would not be required to specify a precise number of channels in distinguishing small and large CMRS licensees. Instead, when frequency reuse is employed, the licensee would automatically be considered large.^{8/} As a practical matter, when a carrier acquires that number of channels which makes it attractive to employ frequency reuse, it will likely provide service to a different type of customer. Local SMRs will likely continue to provide service to a business base, while wide area SMR licensees, who would be considered large CMRS providers in this context, will, as

^{8/} The Company recommends that frequency reuse be employed as a determinative factor in distinguishing large and small CMRS providers when such reuse permits the licensee to operate its channels on a primary basis throughout a service area. Reuse of channels on a secondary basis, as is permitted today, would not be considered in a determination of whether a CMRS licensee was small or large for forbearance purposes.

noted above, seek to provide service to consumers. E.F. Johnson urges the Commission, therefore, to employ a definition of small and large CMRS licensees that encompasses frequency reuse in determining when further forbearance is appropriate.

Under the Company's recommendation, the Commission could determine if a carrier was large or small, based upon the area where it provided service. It would, therefore, be unnecessary for the Commission to determine how to treat operators of systems in different markets. If a licensee met the test for a small entity in one market, its system there would be subject to further forbearance. If the same entity met the test for a large system elsewhere, it would not be subject to further forbearance in that market. Where different, or affiliated entities contribute channels to the operation of a system, as is the case today in the wide area SMR market, such systems, regardless of the form of ownership, would be subject to the full Title II CMRS regulatory scheme if those systems met the frequency reuse test suggested by the Company. Similarly, the Company urges that systems operated pursuant to an exclusive management contract be considered under common ownership or control in a specific market for purposes of determining if the licensee is large or small, using the Company's formulation or any other definition.^{9/}

B. Application of Further Forbearance

Local and wide area SMR providers do not, as the Company expects the Commission to determine in the CMRS Further Notice, provide substantially similar, substitutable service. As

^{9/}In the CMRS Further Notice the Commission has proposed the elimination of the so called 40 mile rule. If that proscription is removed, the Company expects that the proliferation of management contracts will subside. Today, in the Company's experience, the majority of management contracts are used to evade the restrictive effects of the 40 mile rules.

noted above, wide area SMR licensees, cellular providers and broadband personal communications service ("PCS") licensees will seek to provide mobile telephone service, while local SMR licensees will provide dispatch and interconnect service to commercial entities. Local SMR licensees, need not, therefore, be heavily regulated in a manner designed to protect consumers.

Several of the Sections of the Communications Act identified by the Commission in the NPRM will not impose any additional burdens on small CMRS providers. Accordingly, it is not necessary for the Commission to further forbear from enforcing the provisions of Sections 210 (Franks and Passes); Section 223 (Obscene, Harassing, Indecent Communications); and Section 227 (Unsolicited Phone Calls and Facsimile Transmissions).^{10/} Sections 213, 215, 218, 219 and 220 are reservations of Commission authority. While none of these provisions impose affirmative obligations on carriers, each could potentially result in additional burden on small CMRS licensees in the future. Accordingly, the Commission should forbear from the application of these sections of the Act to small CMRS licensees.

Section 228 of the Act (Pay Per Call Services) imposes different obligations on interexchange carriers, local exchange carriers and carriers in general. Local exchange carriers must offer subscribers an option to block "900" services. In general, under this Section, carriers have an obligation: 1) with certain exceptions, not to charge for 800 and other toll free calls; 2) not to transmit collect information services unless certain conditions are met; and 3) not to disconnect or interrupt service for failure to remit pay per call or similar charges. Although

^{10/} The Company does not object to the imposition of regulations based upon Sections 223 and 227 because in both cases, a licensee would affirmatively choose to enter the business that would subject it to additional regulatory burdens.

technically feasible, the requirement to block 900 calls would impose a burden on small CMRS. Because this requirement is imposed only on local exchange carriers, the Commission should, in the context of this proceeding, affirm that small CMRS licensees are not local exchange carriers. The Company does not object to the imposition of the other requirements of Section 228, if applicable, on small CMRS providers. However, the Commission should affirm that while CMRS licensees may not charge for 800 and other toll free calls, they may continue to charge per minute of use or similar charges for the airtime used during the 800 call. This practice is consistent with the actions of cellular carriers today.

Section 226 of the Act (Operator Service), embodies the provisions of the Telephone Operator Consumer Services Improvement Act ("TOCSIA"). TOCSIA protects consumers making interstate operator service calls against unreasonably high rates and anti-competitive practices. Calls must be placed from phones available to the public. Small CMRS providers, at least in the context of service formerly regulated by Part 90 of the regulations, do not generally make telephone service available to the public on an itinerant basis. These services are usually subscription based. Accordingly, the Company asks the Commission to confirm that small CMRS licensees will not generally be subject to TOCSIA requirements.^{11/}

Section 225 (Telecommunications Relay Services) of the Act requires all common carriers providing telephone voice transmission capabilities to provide service that enables persons with hearing and speech disabilities to communicate with hearing individuals. TRS facilities are

^{11/}Should a CMRS licensee make telephone service available through the use of rental units, for example, where there is no subscription relationship between the carrier and the customer, the provisions of TOCSIA might apply even to small CMRS licensees. However, like Sections 223 and 227, application of Section 226 under those circumstance would be based upon a business decision of the licensee, and not ordinarily applicable.

equipped with special equipment and staffed by individuals who relay communications between people who use text telephones and those who use standard phones. Common carriers may choose one of the following methods of offering TRS: 1) individually; 2) by designating another entity; 3) by a competitively selected vendor; or 4) in concert with other carriers. Section 225 also provides for the establishment of, and contribution to a TRS fund, designed to recover the interstate portion of the provision of TRS. The fund is currently governed by the National Exchange Carriers Association ("NECA").

As noted above, local SMR licensees who will be categorized as small CMRS providers do not provide services that are substantially similar to cellular, wide area SMR and broadband PCS service. Local SMR service is not used primarily as an alternative telephone service. Local SMR service users, while capable of accessing long distance networks, typically do not use the system for making long distance calls. Contribution to the NECA administered TRS fund will, therefore, have a minimal impact upon local SMR licensees who will be small CMRS providers. The Company does not object to imposition of this requirement on small CMRS providers.

However, the Company requests exemption for small CMRS licensees from those provisions of Section 225 that require carriers to provide TRS. Because small CMRS service is subscription based, and not made broadly available to the public, application of TRS requirements are not necessary for consumer protection purposes. Provision of TRS would be burdensome for local SMR licensees who would be regulated as small CMRS providers. Typically, these licensees operate today with a very small staff. A requirement to add personnel to perform TRS responsibilities, or pay another entity to perform that function, would, as a percentage of a licensee's expenses, be significant.


III. CONCLUSIONS

Not all CMRS licensees should be subject to the full panoply of Title II regulation designed to govern the practices of entities providing telephone like services to consumers. The Commission should adopt, in this proceeding, standards that may be employed now and in the future, to determine which entities will preemptively be exempt from Title II regulation in those instances where the FCC has the authority to do so. In particular, E.F. Johnson urges the Commission to employ a definition of large and small CMRS licensees that encompasses frequency reuse in determining when further forbearance is appropriate. Because small CMRS licensees will not provided telephone like service to the public, the Commission should forbear from the enforcement of several of the provisions of Title II noted in the NPRM. In particular, the Commission should forbear from Sections 213, 215, 218, 219 and 220 of the Act and the provisions of Section 225 that would require small CMRS to provide TRS. The Company also requests that the Commission confirm that the provisions of Section 228 (to the extent they apply to local exchange carriers) and Section 226 do not apply to small CMRS licensees.

WHEREFORE, THE PREMISES CONSIDERED, the E.F. Johnson Company hereby submits the foregoing Comments and urges the Commission to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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